IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.12.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

and

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

O.S.A. No.418 of 2003

M/s. Bhakthi Constructions,
represented by its
Proprietor S.Valayutham ... Appellant

v.

1. Union of India, represented
by Chief Engineer MES,
Chennai Zone,
By Commander Works Engineer
Navy, Chennai 9.

2. The Commander Works Engineer,
Naval Air Station, Arakkonam 631 002.

3. Mr.Asif Ali, Sole Arbitrator,
No.92, Law Chambers,
High Court Buildings,
Chennai 104.

4. Hon'ble Mr.Justice A.Ramamurthi,
Retired Judge, Madras High Court,
Chennai 600 104. ... Respondents

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Appeal filed under Order XXXVI Rule I of the Original Side Rules against the order of a learned single Judge of this Court dated 14.11.2003 made in O.P. No.34 of 2002.

For Appellant : Mr.Abudukumar Rajaratnam

For Respondents : Mr.A.P. Balasubramanian

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JUDGMENT

K.RAVIRAJA PANDIAN, J.

This appeal is filed by the appellant/contractor against the order of a learned single Judge of this Court dated 14.11.2003 made in O.P. No.34 of 2002 setting aside the entire arbitration award and appointing a new arbitrator and remitting the matter to him for deciding the matter afresh.

2. The facts of the case proceed as follows:

The claimant and the first respondent entered into a contract for provision of security fencing gate, road barriers and chain link fencing around air field at NAS, Arakkonam within a period of seven months from the date of handing over of the site. The site was handed over on 08.08.1990. A major portion of the work was completed on 30.03.1991, leaving an insignificant portion incomplete even after the expiry of the extended period. The first respondent by communication dated 05.05.1994 (marked as Ex.A.5) terminated the contract. The contractor claimed that the delay was on account of various factors, which included the delay on the part of the first respondent as well. Thus, there arose a dispute and the contractor filed O.P. No.718 of 1997 under section 11(6) of the Arbitration and Conciliation Act, 1996 before this Court for appointment of an arbitrator which was ordered on 04.08.1999 appointing the third respondent as a sole arbitrator.

3. Before the arbitrator so appointed, the claimant/contractor made 21 claims under different heads totalling to a sum of Rs.1,00,85,000/- which includes 21% interest.

4. Claim No.1 relates to delay in handing over site. The escalation sought for by the claimant under this first claim was to the tune of Rs.6,83,000/-, for which the arbitrator awarded 25% of the claim, i.e., Rs.1,70,000/- along with interest @ 18% per annum from January 1993 to 04.08.1999 amounting to Rs.2,01,350/- and for the period from 05.08.1999 to 07.07.2001 amounting to Rs.58,650/-. The second claim was in respect of execution of additional works beyond the scope of work, claiming a sum of Rs.2,81,600/-. The arbitrator awarded a sum of Rs.74,000/- and interest at 18% per annum for the said period amounting to Rs.1,13,220/-. Claim No.3 is in respect of the value of the materials lying on the site when the contract was terminated. The contractor claimed a sum of Rs.5,00,000/-. The arbitrator awarded 25% of the claim in a sum of Rs.1,25,000/- and interest over @ 18% amounting to Rs.1,91,686/-. Claim No.4 was for non availability of 'B' schedule stores claiming a sum of Rs.1,97,000/- for which the arbitrator awarded a sum of Rs.1,63,400/- carrying interest at 18% for the period from August 1992 to July 2001 amounting to Rs.2,64,708/-. Claim No.5 relates to extra cost of painting due to VVIP's visits. On that count Rs.53,800/- was claimed and the arbitrator awarded a sum of Rs.35,375/- and interest @ 18% per annum from 01.01.1993 to 07.07.2001 amounting to Rs.54,162/-.

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5. Claim No.6 is under the head 'Welding of MS clamps additionally'. Under this head the claim was for Rs.5,68,723.68. An amount of Rs.2,08,233.86 with interest @ 18% amounting to Rs.3,28,696/- was awarded. Claim No.7 was made for additional earth work and concrete carried out for fencing the post claiming Rs.87,000/-. The amount awarded was Rs.54,400/- with interest of Rs.83,342/-. Under Claim No.8, a sum of Rs.59,000/- was claimed for rectification of damaged fencing. The arbitrator awarded a sum of Rs.30,000/- and a further sum of Rs.45,900/- towards interest @ 18%. Claim No.9 relates to delay in payment of RARs. A sum of Rs.5,00,000/- was claimed for which a sum of Rs.3,630/- and interest in a sum of Rs.5,754/- were awarded. Claim No.10 was in respect of provision of 50 mm dia GI pipe for gates in lieu of 75 mm dia GI pipes claiming Rs.1,45,600/-. A sum of Rs.44,205/- and interest in a sum of Rs.40,028.77 were awarded.

6. Claim No.11 relates to return of over issued stores. Rs.90,000/- was claimed under this head for which Rs.89,695/- along with interest in a sum of Rs.99,791/- were awarded by the arbitrator. For the work done in the restricted area a sum of Rs.4,00,000/- was claimed under claim No.12. The arbitrator awarded Rs.2,00,000/- and interest in a sum of Rs.3,21,000/-. Claim No.13 was for a sum of Rs.2,58,130/- under the head 'excess expenditure incurred on estimate due to illegal cancellation of contract. Though the claim was accepted by the arbitrator the amount was not included in the award on the ground that that amount was not due to the claimant by the Department. Claim No.14 relates to payment of escalation claiming Rs.1,52,439/-. The arbitrator awarded a sum of Rs.66,067/- and interest of Rs.1,31,287/-. Claim No.15 was in respect of bank guarantee executed by the claimant in a sum of Rs.2.01 lakhs encashed by the respondent. The said claim has been allowed with interest in a sum of Rs.2,56,275/-.

7. 16th claim relates to recovery for under issue of stores. A sum of Rs.3,082/- was claimed to have been recovered by the department. The arbitrator held it to be illegal and allowed it. Further, he granted interest over it @ 18% in a sum of Rs.2,218/-. Claim No.17 was made for Rs.2,48,332.24 towards refund of risk and costs. This was also held in favour of the claimant and the said amount less Rs.36,000/- was granted along with interest in a sum of Rs.1,81,074/-. The 18th claim was made for a sum of Rs.20,00,000/- towards loss of reputation in banks, local market etc., was rejected by the arbitrator. Claim No.19 relates to turnover loss at 10% per annum on the award amount. The arbitrator assessed the loss at 4% per annum on the award amount for a period of 4-1/2 years. The 20th claim was for interest at 25% per annum on the amount of claim from the date of cancellation upto the date of award. Interest has been granted under each and every head @ 18%. The 21st claim related to various heads like, fee for counsel, arbitrator, towards hire charges for car for Managing partner and staff and for expenditure incurred by them during the 40 days, expenses incurred

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by Finance Manager for 72 hearings, train fare for the Engineers from Cuddappah to Chennai, their stay in hotels, towards preparation of statements of claims, payments made to technical consultant, legal expenses totalling to a sum of Rs.2,50,000/- was claimed which was allowed in total.

8. This award of the arbitrator was challenged in O.P. No.34 of 2002 by the first respondent herein. The learned single Judge, taking note of the fact that in respect of the left out work of 1% by the contractor, the value of which was calculated to Rs.33,941/-, the appellant had claimed several lakhs and the arbitrator had accepted the claim of the appellant to an extent of Rs.25,66,948/- along with interest in a sum of Rs.26,70,460/- in total a sum of Rs.52,37,448/- The claim of escalation and the award made by the arbitrator for the claim and the award of interest was regarded by the learned single Judge as ex facie arbitrary and error apparent on the face of the records, which shocks the conscience of the Court. The learned single Judge, dealing with the first two claims, was of the view that the claim made by the contractor was nearly 905.90% and it is very fanciful claim made by the appellant and this fanciful claim has been awarded by the arbitrator almost as claimed, which is an error apparent on the face of the award. The learned single Judge opined that in view of the finding recorded in those two items, which shook the conscience of the Court, the rest of the claims need not be gone into on merits and thus set aside the entire award. The learned single Judge, while so setting aside the award, remitted the matter back to be decided by a new arbitrator, afresh and the learned single Judge also proceeded to appoint that new arbitrator and appointed a retired Honourable Judge of this Court as new arbitrator. This order of the learned single Judge is assailed before us on many grounds.

9. Heard the learned counsel on either side and perused the materials available on record.

10. From the impugned order of the learned single Judge it could be seen that the learned single Judge dealt with only two claims and without considering the rest, came to the conclusion that in view of the finding arrived at in respect of those two claims, which, according to him was fanciful, arbitrary to the core and illegal claim and the award of the arbitrator shook the conscience of the Court, the rest of the claims need not be gone into since they were consequential in nature and thus quashed the award in its entirety. We are of the view that when the appellant has made the claims under various heads by giving reasons and the arbitrator, in turn, has awarded the claim under each head, it is the duty of the Court to consider each one of the claims individually and render a finding as to the entitlement or otherwise of each claim. Of-course, in the opinion of the learned single Judge, the claim made might be ex facie illegal and shaking the conscience of the Court, but that by itself cannot be a reason to quash the award in its entirety without considering the other claims.

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11. The next aspect of the matter is remitting back the matter to the new arbitrator. It is settled by the apex Court in the case of Mcdermott International Inc. v. Burn Standard co. Ltd., (2006) 11 SCC 181, wherein it was held that the 1996 Act makes provisions for supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The Court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the Court at minimum level and this can be justified as the parties to the agreement make a conscious decision to exclude the Court's jurisdiction by opting for arbitration as they prefer expediency and finality offered by it. Hence, in an application taken out under section 34 of the Act, the Court can set aside the award leaving the parties free to begin the arbitration again if it is desired. The order of remittal is thus not correct.

12. Apart from this, the learned single Judge has remitted the matter to a new arbitrator by appointing a retired Honourable Judge of this Court as new arbitrator. It could be seen from the records that the arbitrator, the third respondent, has been appointed under section 11(6) of the Arbitration and Conciliation Act, 1996 on 04.08.1999 in O.P. No.718 of 1997 by the designated Judge of the Chief Justice, which is now regarded to be a judicial order in view of the larger Bench decision of the apex Court. (SBP Co. Ltd. v. Patel Engg. Ltd., (2005) 8 SCC 618). Hence, the order of the learned single Judge appointing a new arbitrator and remitting the matter back to him, while considering the correctness of the award, under section 34 of the Act cannot be legally sustained.

13. In the result, the order of the learned single Judge is set aside, and the matter is remitted back to a learned single Judge of this Court for reconsideration with the request that the matter may be taken at his convenience at an early date. The appeal is allowed. No costs.

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Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1. The Sub Assistant Registrar
Original Side,
High Court, Madras.

2. Hon'ble Mr.Justice A.Ramamurthi,
Retired Judge/ Arbitrator
Plot No.9, (HIG) TNHB / Phuase II
Nolambur, Mogappair west, Chennai-102.

1 ccto Mr.A.P. Balasubramanian, Advocate, (ACGSC) SR. 71457

OSA. No.418 of 2003

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